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Supreme Court of the United States

OCTOBER TERM, 1991

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

JAIRO JONATHAN ELIAS ZACARIAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. FORCED RECRUITMENT BY A GUERRILLA GROUP PROVIDES A BASIS FOR A CLAIM OF PERSECUTION ON ACCOUNT OF POLITICAL OPINION WITHIN THE MEANING OF THE UNITED NATIONS CONVENTION AND THE REFUGEE ACT 6

A. The Definition of "Refugee" In The Refugee Act Must Be Construed Consistently With The United Nations Convention And Protocol 6

B. Petitioner's Interpretation Of The Refugee Definition Is Inconsistent With The United Nations Convention and Protocol 7

C. An Asylum-Seeker Need Not Prove The Subjective Motives Of The Persecutor In Order To Establish Refugee Status 10

1. The Focus Of A Refugee Status Determination Is On The Asylum-Seeker's State Of Mind 11

2. Forced Recruitment Or Retaliation For Refusal To Join A Guerrilla Group Is Sufficient Harm To Support A Claim Of Persecution 12

3. Persecution Is "On Account Of" Political Opinion When A Political Opinion Leads To Persecution, Regardless Of The Motive Of The Persecutor 15

4. Resistance To Recruitment By A Guerrilla Group Is The Manifestation Of A Political Opinion 17

TABLE OF CONTENTS—Continued

II. UPHOLDING THE NINTH CIRCUIT'S DECISION IN THIS CASE WILL NOT MAKE ALL "DISPLACED PERSONS" AND DRAFT EVADERS ELIGIBLE FOR ASYLUM 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases: Page

Ananeh-Firempong v. *INS*, 766 F.2d 621 (1st Cir. 1985) 12
Bolanos-Hernandez v. *INS*, 767 F.2d 1277 (9th Cir. 1984) 13
Carvajal-Munoz v. *INS*, 743 F.2d 562 (7th Cir. 1984) 12
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 6, 7, 11, 12
McMullen v. *INS*, 658 F.2d 1312 (9th Cir. 1981) 12, 13
Mountain States Tel. & Tel. Co. v. *Pueblo of Santa Ana*, 472 U.S. 237 (1985) 11
Murray v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 7
Washington v. *Davis*, 426 U.S. 229 (1976) 16
Weinberger v. *Rossi*, 456 U.S. 25 (1982) 7

Treaties, Statutes and Regulations:

1951 United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 ..... 2, 6, 9, 13
1967 United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 2
Constitution of the International Refugee Organization, Dec. 16, 1946, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3 8
The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, *codified at* 8 U.S.C. § 1101(a)(42)(A) (1991) 6

United Nations Materials:

34 U.N. GAOR Supp. (No. 12A), U.N. Doc. A/AC.96/572 (1979) 11
35 U.N. GAOR Supp. (No. 12A), U.N. Doc. A/AC.96/588 (1980) 11
Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 2-25, 1951, 189 U.N.T.S. 138 10

TABLE OF AUTHORITIES—Continued

	Page
Office of the United Nations High Commissioner for Refugees (Geneva), Inter-Office Memorandum No. 138/89, Field-Office Memorandum No. 114/89 (Dec. 18, 1989)	13, 19
Office of the United Nations High Commissioner for Refugees (Geneva), Inter-Office Memorandum/Field-Office Memorandum (unnumbered) (March 1, 1990)	15
Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), 5 U.N. GAOR Supp. (No. 20) 46 Annex, U.N. Doc. A/428 (1950)	1, 2
U.N. Doc. E/AC.32/SR.3 (1950)	8, 9
U.N. Doc. E/AC.32/SR.18 (1950)	17
U.N. Doc. E/1618 Annex (1950)	17
U.N. Doc. A/Conf.2/SR.3 (1951)	9
United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status (1988)	*passim*
Universal Declaration of Human Rights, G.A. Res. 217A(III), 3 U.N. GAOR Resolutions, 1st pt. at 71, U.N. Doc. A/810 (1948)	13

Miscellaneous:

A. Grahl-Madsen, *The Status of Refugees in International Law* (1966)	8, 10
G. Goodwin-Gill, *The Refugee in International Law* (1983)	13, 18, 19
Gunning, *Expanding the International Definition of Refugee: A Multi-Cultural View*, 13 Fordham Int'l L.J. 35 (1989)	6
H.R. Rep. No. 608, 96th Cong., 1st Sess. (1979)	7
H.R. Rep. No. 781, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 160	7
J. Hathaway, *The Law of Refugee Status* (1991)	2, 6, 17, 19
S. Rep. No. 256, 96th Cong., 1st Sess. (1979), *reprinted in* 1980 U.S. Code Cong. & Admin. News 141	7

TABLE OF AUTHORITIES—Continued

	Page
Singer, *Sutherland Stat. Const.* (4th ed. 1984)	11
The American Heritage Dictionary (2d College ed. 1982)	18
U.S. Department of State, *Country Reports on Human Rights Practices for 1990*, 102d Cong., 1st Sess. (Joint Comm. Print 1991)	15
Weis, *Convention Refugees and De Facto Refugees*, in *African Refugees and the Law* (G. Melander and P. Nobel ed. 1978)	9
Weis, *The Concept of the Refugee in International Law*, 4 Journal du Droit International 928 (1960)	10

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BRIEF *AMICUS CURIAE* OF THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS*

The Office of the United Nations High Commissioner for Refugees [hereinafter "UNHCR"] is charged by the United Nations General Assembly with the responsibility of providing international protection to refugees and other persons within its mandate and of seeking permanent solutions to the problems of refugees.[1] The Stat-

[1] Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), 5 U.N. GAOR Supp. (No. 20) 46 Annex at 46, ¶ 1, U.N. Doc. A/428 (1950).

ute of the Office of the High Commissioner specifies that the High Commissioner shall provide for the protection of refugees by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." [2]

The supervisory responsibility of UNHCR is also formally recognized in the 1967 United Nations Protocol relating to the Status of Refugees [hereinafter "1967 Protocol"], to which the United States became a party in 1968:

> The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees * * * in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.[3]

The views of UNHCR are informed by forty years of experience supervising the treaty-based system of refugee protection established by the international community. UNHCR provides direct assistance to refugees throughout the world and has representatives in over 80 countries: in its Geneva headquarters, in major capitals, on borders, and in numerous remote corners of the world where refugee crises may occur. UNHCR was acknowledged for its work on behalf of refugees by the award of the Nobel Peace Prize in 1954 and again in 1981. Based on the experience accumulated since its establishment in 1951, UNHCR is uniquely qualified to present its views.

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[2] *Id.* at 47, ¶ 8(a).

[3] Jan. 31, 1967, art. II, ¶ 1, 19 U.S.T. 6223, 6226, T.I.A.S. No. 6577, at 4, 606 U.N.T.S. 267, 270. The 1967 Protocol and the 1951 Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter "1951 Convention"], are multilateral treaties that provide the primary international definition of "refugee" and set forth the rights and obligations of persons who satisfy that definition. These international instruments have been signed by more than 100 countries and are the only refugee accords of global scope. J. Hathaway, *The Law of Refugee Status* v (1991).

The present case concerns the interpretation of statutory provisions based on the 1951 Convention and the 1967 Protocol. Thus, it presents questions involving the essential interests of refugees within the mandate of the High Commissioner. Resolution of the case is likely to affect the interpretation by the United States of the 1967 Protocol with regard to the determination of refugee status and the grant of asylum to those who qualify for such status. Moreover, UNHCR anticipates that the decision in this case may influence the manner in which the authorities of other countries apply the refugee definition contained in the 1951 Convention and incorporated by reference in the 1967 Protocol.

UNHCR has the consent of all parties to this case to present its views.

SUMMARY OF ARGUMENT

This case is about whether forced recruitment or punishment for refusal to join a guerrilla group may constitute persecution on account of political opinion—and thus serve as the basis for a claim of refugee status—in the absence of proof regarding the specific motive of the guerrillas. At the center of this issue is statutory language of the 1980 Refugee Act that comes directly from an international treaty to which the United States is a signatory. It is not disputed by the parties to this case that when Congress passed the Refugee Act, it intended that the definition of "refugee" contained therein be interpreted consistently with the international definition from which it was derived.

Petitioner's position is that, in order to show persecution on account of political opinion, an asylum-seeker must prove that his persecutors specifically intended to "discriminate against [him] because of his political beliefs." Petitioner's Brief at 10 [hereinafter "Pet. Br."]. Moreover, Petitioner's scheme would require an asylum-seeker to overcome a presumption that the motive of a

guerrilla group engaging in forced recruitment is only "to field an army." Pet. Br. at 27. To support this view, Petitioner refers the Court to a definition of "refugee" that was *not* adopted by Congress and that was operative in the international community for only a short period after World War II. Petitioner also contends that the requirement it asks this Court to engraft upon the refugee definition—proof of the persecutor's motive—is necessary to avoid a blanket grant of refugee status to *all* persons fleeing generalized civil strife, as well as to *all* persons evading conscription.

This brief will show, first, that the statutory language at issue must be construed consistently with the 1951 Convention and 1967 Protocol. The definition of "refugee" adopted by Congress was derived from an international treaty definition that far surpassed in scope previous definitions. The 1951 Convention was expressly intended to broaden the definition of "refugee" that had been provided under predecessor instruments.

Second, this brief will show that requiring proof of the persecutor's discriminatory motive is inconsistent with accepted international interpretations of the term "refugee," including the interpretation of UNHCR. Examination of the analytic framework for refugee status determinations reveals that a person may satisfy the definition without any reference to persecutorial intent.

The focus of a refugee status determination is on the asylum-seeker's state of mind, not the intent of the persecutor. Forced recruitment or retaliation for refusal to join a guerrilla group deprives its victims of life or physical freedom and clearly constitutes sufficient harm to support a claim of persecution. This brief will demonstrate that the statutory "on account of" language requires only that there be some nexus between a political opinion and the feared persecution. Nowhere does the definition of "refugee" or the established analytic framework

for determining refugee status contemplate that a showing of persecutorial intent is necessary to establish this nexus. Moreover, the conscious refusal to join a guerrilla group is a political act that places an individual in opposition to his recruiters and manifests an essentially political opinion.

Finally, this brief will show that upholding the decision of the court below will not result in blanket refugee eligibility for all displaced persons and draft evaders. The definition of "refugee" contained in the 1951 Convention, 1967 Protocol and the Refugee Act is limited to persons who can show a well-founded fear of individualized persecution. Many persons displaced by generalized conditions of violence in war-torn countries have not been subject to forced recruitment and may have no reason to fear persecution. Furthermore, conscription by a legitimate government is distinguishable from forced recruitment by a para-military or subversive group. Although persons fleeing the compulsory conscription laws of a legitimate government may, in limited circumstances, establish a claim for refugee status, the mere fear of prosecution for draft evasion does not by itself constitute a well-founded fear of persecution under the definition of "refugee."

ARGUMENT

I. FORCED RECRUITMENT BY A GUERRILLA GROUP PROVIDES A BASIS FOR A CLAIM OF PERSECUTION ON ACCOUNT OF POLITICAL OPINION WITHIN THE MEANING OF THE UNITED NATIONS CONVENTION AND THE REFUGEE ACT.

A. The Definition of "Refugee" In The Refugee Act Must Be Construed Consistently With The United Nations Convention And Protocol.

The 1951 Convention provides that the term "refugee" shall apply to any person who, "owing to a well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership of a particular social group or *political opinion*," is unable or unwilling to return to his or her country of origin or former habitual residence. 1951 Convention, *supra* note 3, art. I(A)(2) at 152 (emphasis added). This definition was adopted in the 1967 Protocol,[4] and served as the basis for the definition of "refugee in the 1980 Refugee Act. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987). Under the terms of the Refugee Act, a person who is outside his or her native country and who is unable or unwilling to return to that country because of "persecution or a well-founded fear of persecution *on account of* * * * *political opinion*" is a refugee. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, *codified at* 8 U.S.C. § 1101(a)(42)(A) (1991) (emphasis added) [hereinafter "Refugee Act"].[5]

[4] The 1967 Protocol incorporated by reference the substance of the 1951 Convention definition, but achieved the formal universalization of the definition by prospectively eliminating its temporal and geographic restrictions. J. Hathaway, *supra* note 3, at 10. These changes were affected in order to respond to the changing nature of refugee flows after World War II. Gunning, *Expanding the International Definition of Refugee: A Multi-Cultural View*, 13 Fordham Int'l L.J. 35, 45 (1989).

[5] Petitioner and UNHCR agree that the "on account of" language used in the 1980 Refugee Act has the same denotation as the "for reasons of" language used in the 1951 Convention and adopted in the 1967 Protocol. Pet. Br. at 13.

It is axiomatic that, in passing the 1980 Refugee Act, Congress intended to make the domestic law of the United States consistent with its international obligations under the 1967 Protocol.[6] Indeed, this Court has noted:

> If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees * * * to which the United States acceded in 1968.

Cardoza-Fonseca, 480 U.S. at 436-37.[7]

B. Petitioner's Interpretation Of The Definition Of "Refugee" Is Inconsistent With The United Nations Convention and Protocol.

Although the language chosen by Congress in 1980 to define "refugee" is virtually identical to the corresponding language of the 1967 Protocol,[8] Petitioner's interpre-

[6] H.R. Rep. No. 781, 96th Cong., 2d Sess. 19, *reprinted in* 1980 U.S. Code Cong. & Admin. News 160, 160. *See also* S. Rep. No. 256, 96th Cong., 1st Sess. 4 (1979), *reprinted in* 1980 U.S. Code Cong. & Admin. News 141, 144; H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979).

[7] Although clear congressional intent is evident in this case, construction of the Refugee Act consistent with the 1951 Convention and 1967 Protocol would be required even in the absence of express congressional intent, since the statute must be construed consistently with international law. *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (a statute "ought never to be construed to violate the law of nations, if any other possible construction remains").

[8] *Cardoza-Fonseca*, 480 U.S. at 437. Petitioner does not appear to dispute, *see* Pet. Br. at 10, that the language of the Refugee Act at issue in this case must be interpreted consistently with the provisions of the 1951 Convention and 1967 Protocol.

tation of the relevant provisions is far more narrow than that intended by the drafters of the 1951 Convention and 1967 Protocol. By focusing on outdated portions of the definition of "refugee" contained in the Constitution of the International Refugee Organization [hereinafter "IRO"] [9]—"victims of the nazi or fascist regimes," "Spanish Republicans," and "other victims of the Falangist regime in Spain"—Petitioner would have this Court conclude that the history of the international agreements on which the Refugee Act's definition is based operates as a "limitation on asylum eligibility." Pet. Br. at 14-16.[10]

In reality, however, State and United Nations practice, judicial decisions and refugee literature point to a broadening of the concept of "refugee" in international instruments. The definition of "refugee" in the 1951 Convention, although derived in part from the IRO Constitution, was in many ways far more comprehensive and forward-looking than its predecessors.[11] The 1951

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[9] Dec. 16, 1946, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3. The IRO was a temporary, specialized agency of the United Nations that operated from August 1948 to January 1952. 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 18 (1966).

[10] The limited categories of the IRO definition are not relevant to this case. The crucial issue with regard to the history of the definition is how the term "refugee" developed in response to the changing character of refugee problems. It was this developing definition, as incorporated in the 1967 Protocol, with which the drafters of the Refugee Act were familiar and that they intended to adopt.

[11] In discussions formulating the 1951 Convention, one delegate urged that "what had so far been accomplished * * * be reconsidered in a more generous spirit," that the terms be "truly liberal," and that the "definition [of refugee] to be adopted * * * be as all-embracing as possible." U.N. Doc. E/AC.32/SR.3 ¶¶ 25, 26, 28 (1950) (statement of Mr. Rain—France). Another delegate expressed his satisfaction that, under the Convention definition, "protection [w]ould be extended to as many refugees of all categories

Convention provided for the first time in international law a universal definition of "refugee" not limited to individual categories of persons.[12] Accordingly, the Preamble to the 1951 Convention states that "the United Nations has [concluded] that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and *to extend the scope of and the protection accorded by such instruments* by means of a new agreement." 1951 Convention, *supra* note 3, Preamble at 150 (emphasis added).[13]

The drafters did not intend the terms of the 1951 Convention to be interpreted restrictively.[14] They expressly recommended that:

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as possible." U.N. Doc. A/Conf.2/SR.3 at 5 (1951) (statement of Mr. del Drago—Italy). A statement by one of the drafters of the 1951 Convention confirms that the definition was meant to be interpreted expansively: "[T]he drafters did not have specific restrictions in mind when they used this terminology. Theirs was an effort to express in legal terms what is generally considered as a * * * refugee." Weis, *Convention Refugees and De Facto Refugees*, in *African Refugees and the Law* 15 (G. Melander and P. Nobel ed. 1978). The United States delegate to the *Ad Hoc* Committee expressed concern that the definition of "refugee" to be adopted not be too narrow and that the field of application of the Convention not be "excessively restricted." U.N. Doc. E/AC.32/SR.3 ¶ 40 (1950) (statement of Mr. Henkin—United States).

[12] "The phrase 'well-founded fear of being persecuted' * * * replaces the earlier method of defining refugees by categories * * *." UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* at ¶ 37 (1988).

[13] Thus, Article I(A)(1) of the 1951 Convention specifies that decisions of non-eligibility by the IRO would not preclude the granting of refugee status to any person who fit the Convention's "refugee" definition. 1951 Convention, *supra* note 3, at 152.

[14] No forms of persecution were intentionally excluded from the Convention's "refugee" definition. According to one of the Convention's key architects and a former Director of the Legal Division of UNHCR, the spectrum of phenomena envisioned by the

> the Convention * * * have value as an example exceeding its contractual scope and that all nations * * * be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides.[15]

Thus, contrary to Petitioner's exposition of the history of the refugee definition, the definition of "refugee" acceded to by the United States in 1968 and adopted into domestic law in 1980 was specifically intended to fulfill the broad humanitarian objectives of the international community.

C. An Asylum-Seeker Need Not Prove The Subjective Motives Of The Persecutor In Order To Establish Refugee Status.

The definition of "refugee" requires focus on the state of mind of the person seeking refugee status, not on that of the persecutor. Under the terms of the 1951 Convention and 1967 Protocol, a person seeking refugee status must demonstrate: (1) that he or she has a well-founded fear; (2) that he or she fears persecution; (3) that the feared persecution is for reasons of, (4) one of the five enumerated factors (*e.g.*, political opinion).[16]

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drafters encompassed a wide variety of measures "in disregard of human dignity." Weis, *The Concept of the Refugee in International Law*, 4 Journal du Droit International 928, 970 (1960). The drafters sought "a flexible concept which might be applied to circumstances as they might arise; * * * they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men." 1 A. Grahl-Madsen, *supra* note 9, at 193.

[15] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 2-25, 1951, IV(E), 189 U.N.T.S. 138, 148.

[16] The interpretation of the "on account of" language must be informed by the meaning of the other elements of the definition: "well-founded fear," "persecution" and "political opinion."

Although Petitioner appears to accept that Respondent has established a well-founded fear of persecution, Pet. Br. at 12, Petitioner later combines the elements of "persecution" and "on account of

1. *The Focus Of A Refugee Status Determination Is On The Asylum-Seeker's State Of Mind.*

The point of departure in a refugee status determination is the asylum-seeker's fear, not the persecutor's intention. The "well-founded fear" portion of the definition contains two separate elements: the applicant's subjective fear and the objective reasonableness of that fear.

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* [hereinafter "*Handbook*"] [17]

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political opinion," defining "persecution" as the "infliction of suffering *because of* the victim's race, beliefs, or nationality," *id.* at 13 (emphasis added). Petitioner in effect collapses the "on account of" language into its definition of "persecution." This interpretation of "persecution" violates a fundamental canon of statutory construction that "[a] statute should be construed so that effect is given to all its provisions so that no part will be inoperative or superfluous." Singer, 2A *Sutherland Stat. Const.* § 46.06 (4th ed. 1984). *See also Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). Under Petitioner's interpretation, the "on account of" language is subsumed under the definition of "persecution," making that portion of the statutory language redundant.

[17] The UNHCR *Handbook* was prepared in 1979 at the request of States members of the Executive Committee of the High Commissioner's Programme—the United States among them—in order to provide guidance to governments in applying the terms of the Convention and Protocol. The *Handbook* is based on UNHCR's experience, including the practice of States in determining refugee status, exchanges of views between the Office of the High Commissioner and the competent authorities of Contracting States, and the literature devoted to the subject over a quarter of a century. *Handbook* at 1-2. The *Handbook* has been widely cited with approval both by governments, *see, e.g.*, 34 U.N. GAOR Supp. (No. 12A) at ¶¶ 68, 72(1)(h), U.N. Doc. A/AC.96/572 (1979); 35 U.N. GAOR Supp. (No. 12A) at ¶ 36, U.N. Doc. A/AC.96/588 (1980), and in many judicial decisions. This Court and other United States federal courts have turned to the *Handbook* for guidance in the interpretation of the 1967 Protocol. *See, e.g., Cardoza-Fonseca*, 480 U.S. at 439 n.22 ("the *Handbook* provides significant guidance in construing the Protocol . . . [and] in giving content to the obligations that the

emphasizes that "[t]he phrase "well-founded fear of being persecuted' is the key phrase of the [refugee] definition. It reflects the views of its authors as to the main elements of refugee character." *Handbook* at ¶ 37. This Court has noted that the "obvious focus" of a refugee status determination is on the "subjective beliefs" of the applicant. *Cardoza-Fonseca*, 480 U.S. at 413. Proof of the state of mind of the persecutor is not required by the Convention, and nowhere appears as a requirement in the *Handbook* sections regarding the interpretation of the term "refugee." *See Handbook* at ¶¶ 35-110. Emphasis on the motive of the persecutor is thus incompatible with the accepted analytic framework for determining refugee status.

2. *Forced Recruitment Or Retaliation For Refusal To Join A Guerrilla Group Is Sufficient Harm To Support A Claim Of Persecution.*

The term "forcible recruitment" refers to the threat or application of force upon an individual to coerce performance of military service, or the retaliation against an individual to punish refusal to serve. Petitioner's extensive reliance on the guerrilla group's ultimate aim "to field an army" and the group's purported non-discriminatory recruitment practices, Pet. Br. at 10, 27-30, misses the point of "*forcible* recruitment." It is not necessarily the initial selection of recruits or mere request to serve in the guerrilla army that constitutes the feared persecution, but rather the concomitant or subsequent use of force to overcome or punish the individual's conscious refusal to go along willingly.

Although the precise parameters of the term "persecution" continue to evolve, there is broad agreement in the

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Protocol establishes"); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626-628 (1st Cir. 1985); *Carvajal-Munoz v. INS*, 743 F.2d 562, 574 (7th Cir. 1984); *McMullen v. INS*, 658 F.2d 1312, 1319 (9th Cir. 1981).

international community about the essential elements of "persecution" under the Convention definition. The Universal Declaration of Human Rights, G.A. Res. 217A (III), 3 U.N. GAOR Resolutions, 1st pt. at 71, U.N. Doc. A/810 (1948), [hereinafter "Universal Declaration"], expressly referenced in the Preamble to the 1951 Convention, *supra* note 3, at 150, is a benchmark for the humane treatment of all persons and provides standards for identifying what should be considered persecutory acts. The Universal Declaration identifies as fundamental human rights the right to life, liberty and security of person, as well as the right to freedom of movement. Universal Declaration, *supra* at 72, 74, arts. 3, 13. Thus, at a minimum, "[t]he core meaning of persecution readily includes the threat of deprivation of life or physical freedom." G. Goodwin-Gill, *The Refugee in International Law* 38 (1983) (citations omitted).

Forced recruitment by a guerrilla group [18] is a paradigm of the deprivation of these rights. When a person is recruited, refuses to join and is threatened with abduction or punishment by armed guerrillas, his life and freedom are placed in jeopardy. As the *Handbook* points out: "From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of * * * [one of the five reasons] * * * is *always* persecution." *Handbook* at ¶ 51 (emphasis added).

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[18] There is no dispute that the Refugee Act encompasses persecution by non-governmental groups. *See, e.g., Handbook* at ¶¶ 65, 98; G. Goodwin-Gill, *supra*, at 42; Office of the United Nations High Commissioner for Refugees (Geneva), Inter-Office Memorandum No. 138/89, Field-Office Memorandum No. 114/89 (Dec. 18, 1989) (the fact that persecution is by a guerrilla group "does not deprive the acts of their persecutory character"); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1284 (9th Cir. 1984); *McMullen v. INS*, 658 F.2d 1312, 1315 & n.2 (9th Cir. 1981). Petitioner agrees. Pet. Br. at 30 ("many acts by guerrilla groups * * * constitute 'persecution on account of * * * political opinion'").

Indeed, since guerrilla groups lack the legal authority to conscript, the use of force by such groups to defeat or punish the refusal to join would essentially constitute kidnapping, murder, or other illegal conduct. The *Handbook* expressly distinguishes legal *prosecution* from *persecution*:

> In countries where military service is compulsory, failure to perform this duty is frequently punishable by law * * *. The penalties may vary from country to country, and are not normally regarded as persecution. Fear of *prosecution* and punishment for * * * draft-evasion does not in itself constitute well-founded fear of *persecution* under the definition.

Handbook at ¶ 167 (emphasis added).

In contrast to a legitimate government's enforcement of its mandatory conscription laws, the force meted out by a guerrilla group in dragooning civilians into its army or punishing resistance is not prosecution under color of law. The victim of forced recruitment by a guerrilla group has no access to due process of law and is not protected by the safeguards of his or her government's legal code. Moreover, whereas a person resisting legal conscription by his or her government may have the option of alternative service, or in lieu thereof may serve a prison sentence or otherwise comply with a legal judgment, the victim of forced recruitment is at the arbitrary mercy of the particular guerrillas who attempt to recruit him.[19]

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[19] Enforcement of mandatory conscription laws by a legitimate government may also sometimes constitute persecution. *Handbook* at ¶¶ 167-174. One such instance is when the type of military action engaged in by the state is "condemned by the international community as contrary to basic rules of human conduct." *Handbook* at ¶ 171. Thus, failure to accord protection to a person resisting collaboration with a group that might require him to violate the rights of others would be inconsistent with the humanitarian concepts which gave rise to the 1951 Convention. Indeed, it would seem paradoxical for nations to decry violence perpetrated by rebel groups against sovereign governments on the one hand, *see, e.g.*, U.S. Department of State, *Country Reports on Human Rights Practices for 1990*, 102d Cong., 1st Sess. 632 (Joint Comm. Print 1991) (Country Report on Guatemala) ("Guerrillas engaged in * * * extrajudicial killings, indiscriminate use of land mines, kidnaping, forced labor and recruitment, and the use of children in combat. * * * [G]uerrillas also attacked and destroyed a medical compound operated by an American family * * * and threatened members of that family with death"), and yet deny protection to those individuals who make a conscious choice to refuse to aid in the commission of such acts.

3. *Persecution Is "On Account Of" Political Opinion When A Political Opinion Leads To Persecution, Regardless Of The Motive Of The Persecutor.*

Petitioner argues that a person is not a refugee unless he can prove that the motive of the persecutor was retribution for his political opinion. Pet. Br. at 9-10. This position is inconsistent with the definition of "refugee." In a memorandum intended to instruct United Nations field officers as to the proper application of the definition of "refugee", the Office of the High Commissioner explained:

> The definition [of refugee] does not require that there must be a specific showing that the authorities intend to persecute an individual on account of [one of the five factors]. As long as persecution or fear of it may be related to the grounds given in the definition, it is irrelevant whether the [persecutor] intended to persecute. It is the result which matters.

Office of the United Nations High Commissioner for Refugees (Geneva), Inter-Office Memorandum/Field-Office Memorandum (unnumbered) (March 1, 1990) (emphasis added).

Indeed, this is the only logical interpretation. Proof of motive or intent may be a sufficient, but is not a necessary, condition of a refugee claim. Although the motivation of a persecutor may be relevant, ultimately it is the fact of persecution, not any specific intent to persecute,

that one reasonably fears and from which the Refugee Act seeks to provide protection.

Moreover, the focus on a persecutor's intent injects into a refugee status determination the burden of proof required in the unrelated field of criminal law. Petitioner's interpretation of the "on account of" language would require an asylum-seeker to prove something akin to *mens rea* on the part of the persecutor. But refugee status examiners are not called upon to decide the criminal guilt or liability of the persecutor, and refugee status is not dependent on such proof. The legal regime of refugee protection—of which the Refugee Act is a part—is centered on the grant of a humanitarian benefit, not on the punishment of persecutors. Thus, an asylum-seeker's burden is to show himself worthy of the benefit; he need not establish his persecutor's state of mind.

Again, this only makes sense. Organizational intent, such as the "intent" of a guerrilla group, is not readily susceptible of proof. In addition, specific discriminatory intent may be impossible to ascertain. *Cf. Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) ("it is unrealistic * * * to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker"). The new requirement—proof of persecutorial intent—that Petitioner would have this Court engraft upon the established definition of "refugee would require an asylum-seeker to divine the specific motives of groups of people who are not in the habit of formally announcing their intentions *vis-à-vis* individuals. Such a requirement would create a virtually impossible burden of proof and would result in the wholesale denial of otherwise valid claims for refugee status.

Requiring proof of persecutorial intent is inconsistent with the broad purposes of the 1951 Convention and the intent of its drafters. In contrast to the numerous

references to the *asylum seeker's* motive and state of mind, there is no suggestion at any point in the drafting history of the 1951 Convention that the motive or intent of the *persecutor* was ever to be considered a controlling factor in the determination of refugee status.[20]

The "on account of" and "for reasons of" language requires only that there be some nexus [21] between an opinion that can be characterized as political and the risk of harm in the country of origin. J. Hathaway, *supra* note 3, at 137.[22] It is enough that the persecution is a consequence of political opinion. Proof of the persecutor's motive is not required to establish this link.

4. *Resistance To Recruitment By A Guerrilla Group Is The Manifestation Of A Political Opinion.*

There can be few political disagreements more deeply held, and more divisive, than the question of whether an individual is willing to fight, kill and die for a political objective. Petitioner posits the case in which "[a] person might be entirely sympathetic to the goals of the guerrillas, and share *every one of their political beliefs*, but not want to serve in their army," Pet. Br. at 11 (emphasis added), as a situation in which resistance to recruitment by a guerrilla group would not have political meaning. But a person who "does not want to serve" in a guerrilla's army does *not* "share every one of [the guerrilla's] political beliefs." Specifically, such a person does not share the belief, which is the *sine qua non* of any

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[20] *See* U.N. Doc. E/AC.32/SR.18 ¶ 10 (1950) (statement of Mr. Robinson—Israel); U.N. Doc. E/1618 Annex (1950).

[21] In the present case, the nexus may be established by deduction from the fact that, had Respondent not refused to serve, the feared persecution—*forced* conscription or other retaliation—would not have been threatened.

[22] The *Handbook* recognizes that "while the definition speaks of persecution 'for reasons of political opinion' it may not always be possible to establish a causal link between the opinion expressed" and persecution. *Handbook* at ¶ 81.

guerrilla group, that the guerrillas' cause is worth fighting for. The belief that a political objective is *not* worth fighting, killing and dying for is a political opinion that triggers the use of force by the guerrilla group.

Regardless of the precise characterization of an individual's motives, the conscious refusal to join a guerrilla group inevitably places the individual in *political* opposition to that group. "Refusal to bear arms, however motivated, reflects an essentially political opinion * * *; it is a political act." G. Goodwin-Gill, *supra* p. 13, at 34.[23] The drafters of the 1951 Convention clearly intended that " 'political opinion' should be understood in the broad sense, to incorporate * * * any opinion on any matter in which the machinery of state, government, and policy may be engaged." *Id.* at 31.[24]

Petitioner cites as support for its claim that Respondent did not fear persecution on account of *political opinion*, the fact that he did not "express[] any political opinion to the guerrillas." Pet. Br. at 29. However, verbal expression of political beliefs simply is not required under the 1951 Convention definition.[25] The *Handbook* specifically acknowledges "situations in which the applicant has not given any expression to his opinions." *Handbook* at ¶ 82. *See also* G. Goodwin-Gill, *supra*

[23] Of course, refusal to bear arms for reasons unrelated to the Convention may not provide a basis for a claim of refugee status. *See, e.g. Handbook* at ¶ 171. Political opinion is only one element of the refugee definition.

[24] This view comports with the plain meaning of the term "political opinion." *See The American Heritage Dictionary* 960 (2d College ed. 1982) (definition of "political" is "of, pertaining to, or dealing with the * * * structure or affairs of government, politics or the state"). Clearly an unwillingness to participate in the violent overthrow of a government constitutes an opinion pertaining to the "affairs of [that] government."

[25] Political opinions need not be and generally are not articulated in the form of sophisticated political science, and they need not rise to the level of being "entirely hostile," Pet. Br. at 11, to the opinion of the persecutor.

p. 13, at 31 ("[p]olitical opinions may or may not be expressed").[26]

Political opinions may be revealed in actions as well as in words. A refugee claim may be grounded "on evidence of engagement in activities which imply an adverse political opinion." J. Hathaway, *supra* note 3, at 152. The *Handbook* recognizes that political opinion may be implicit in conduct and that it may be necessary to look to "the root of [the applicant's] behavior * * *." *Handbook* at ¶ 81.

UNHCR instructs its field offices that political opinion need not be expressed in order to ground a claim for refugee status; political opinion may be imputed based on a refusal to join guerrilla forces: "[I]n the context of internal armed conflict * * * sometimes both the government and insurgent forces * * * cannot accept other than absolute commitment to their respective positions." Office of the United Nations High Commissioner for Refugees (Geneva), Inter-Office Memorandum No. 138/89, Field-Office Memorandum No. 114/89 (Dec. 18, 1989). Consequently, guerrillas are likely to perceive those who refuse to join them as "anti-guerrilla." The class of political opinions which fall under the "refugee" definition thus cannot be limited only to those which are explicitly stated to the persecutor.

II. UPHOLDING THE NINTH CIRCUIT'S DECISION IN THIS CASE WILL NOT MAKE ALL "DISPLACED PERSONS" AND DRAFT EVADERS ELIGIBLE FOR ASYLUM.

Petitioner devotes considerable effort to showing that Congress did not intend to include within the purview of the Refugee Act persons fleeing generalized condi-

[26] Petitioner's approach would require asylum-seekers to present their oppositional political views expressly to potential persecutors. Nowhere does the 1951 Convention or 1967 Protocol require such behavior in order to make out a claim for refugee status.

tions of violence in their home countries. Pet. Br. at 16-21. Petitioner argues that unless its interpretation of the "on account of" language is adopted, such persons, whom Congress sought to exclude, would be eligible for asylum. Petitioner essentially contends that a holding by this Court that forced recruitment by a guerrilla group is persecution "on account of" political opinion would entail granting refugee status to all "displaced persons" fleeing war-torn countries. Pet. Br. at 21 (grant of refugee status in this case "would 'entitle almost anyone in a war torn country to meet the statutory requirements for a grant of asylum' ") (citation omitted).

However, many persons fleeing conditions of violence in their native countries have never been forcibly recruited and may have no reason to fear that they will be individually targeted by either government or anti-government forces. Such persons may not be able to demonstrate a well-founded fear of individualized persecution. This case involves an individual who was specifically singled out for forced recruitment by armed guerrillas. Upholding the Ninth Circuit's decision in this case would not expand the protection of the Refugee Act to cover persons fleeing generalized conditions of violence. Affirmance in this case would, however, protect individuals who have been directly targeted by the guerrillas and who fear forced recruitment or punishment as a result of a refusal to join the guerrillas. Such individuals are not simply caught in the crossfire or seeking refuge from stray bullets; such persons are fleeing bullets aimed directly at them. Thus, Petitioner's concern regarding displaced persons is unfounded.

Likewise, the argument that upholding the Ninth Circuit decision would require that "draft dodgers" be granted asylum is unfounded. Petitioner claims that "[n]o principled distinction can be drawn between persons recruited by guerrillas and persons conscripted by governments," and that therefore, upholding the Ninth

Circuit's decision would make "draft dodgers" eligible for asylum. Pet. Br. at 22. Petitioner appears to advance the position that there is no distinction between conscription by a legitimate government and illegal forcible recruitment by guerrilla or para-military forces.

To the contrary, conscription by a legitimate government is easily distinguishable from forced recruitment by a guerrilla group, and the distinction is implicit in the *Handbook* interpretation of the 1951 Convention which existed at the time the Refugee Act was passed. The *Handbook* recognizes the right of States to enforce mandatory conscription laws. *See, e.g., Handbook* at ¶¶ 167-168, 171, 173. No such provision is made for groups lacking the legal authority to conscript.

Moreover, not all draft evaders fleeing a legitimate government's mandatory conscription laws can make out a claim for refugee status. Persons evading mandatory conscription by their governments are not refugees simply because they fear prosecution for the crime of draft evasion. *Handbook* at ¶ 167. Nor may such a person attain refugee status simply because he "disagree[s] with his government regarding the political justification for a particular military action." *Handbook* at ¶ 171.

The *Handbook* catalogues the specific circumstances that may provide a basis for refugee status in such cases, *Handbook* at ¶¶ 167-174, and these circumstances are limited. They include: (i) conscientious objection, *Handbook* at ¶¶ 170, 172; (ii) military action that "is condemned by the international community as contrary to basic rules of human conduct," *Handbook* at ¶ 171; and (iii) instances in which the individual would suffer disproportionately severe punishment for the offense on account of any of the five reasons enumerated in the refugee definition, *Handbook* at ¶ 169. Thus, the argument that granting refugee status to a person fleeing forced recruitment by a guerrilla group would require granting such status to *all* persons fleeing conscription—legal or otherwise—is entirely without merit.

CONCLUSION

For the foregoing reasons, *amicus* UNHCR urges that the decision of the Court of Appeals for the Ninth Circuit be upheld.

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